2023:DHC:7040

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 02.08.2023***
Pronounced on: 26.09.2023

\+ **CRL.M.C. 4719/2023 & CRL. M.A. 18048/2023**

VIKRAM KATHURIA & ANR. ..... Petitioners

Through: Mr. Surya Narayan Singh, Senior Advocate with Mr. Raman Yadav, Mr.Hemant Kumar, Mr. Charanpreet Singh, Ms. Akriti Chaturvedi and Mr. Priyam Kaushik, Advocates

versus

STATE & ANR. ..... Respondents

Through: Mr. Satish Kumar, APP for the State with SI Bharti Dhondiyal, P.S. Anand Vihar
Mr. Manoj Taneja, Mr. Amit Chadha, Ms. Swati Chawla, Advocates for R2/complainant alongwith R-2/complainant in person

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition under Section 482 of the Code of Criminal Procedure, 1973 (*'Cr.P.C.'*) has been filed on behalf of petitioner seeking setting aside of impugned order dated 09.06.2023 passed by

learned Additional Sessions Judge-05, Shahdara District, Karkardooma Courts, New Delhi (*'learned ASJ'*) in Criminal Revision No. 98/2023 *vide* which the learned ASJ has set aside the order dated 10.04.2023 passed by the learned Additional Chief Metropolitan Magistrate, Shahdara District, Karkardooma Courts, New Delhi (*'learned ACMM'*) on an application filed under Section 91 of Cr.P.C. by the petitioner herein, in case arising out of FIR bearing no. 411/2022, registered at Police Station Anand Vihar, Delhi under Sections 376/377/328/506 of Indian Penal Code, 1860 (*'IPC'*).

FACTUAL BACKDROP

2. The petitioner no. 1 is son of petitioner no. 2. The petitioners, by way of present petition, submit that they have been falsely implicated in the present FIR on the complaint of respondent no. 2. It is stated that the present FIR is absolutely false, replete with false versions of the complainant, and other witnesses in connivance with the local police have concealed correct facts deliberately with a view to mislead the Courts. It is stated that during the pendency of anticipatory bail application of petitioner no. 1 before this Court, in which he had been granted interim protection on10.11.2022, he had come to know that the Investigating Officer (*'IO'*) had preferred to file final report and supplementary report in the present matter. The petitioner no. 1 had inspected the file and had come to know about the deliberate illegal acts of the local police. It is stated that the case has deliberately been falsified by the local police and, therefore, petitioner no. 1 was constrained to file an application under Section

91 of Cr.P.C. before the learned ACMM to ensure that the correct facts were brought on record before the learned Trial Court in order to establish the truth.

3. As stated in the petition, the allegations leveled in the FIR do not disclose commission of any offence against the petitioners. It is stated that as per contents of complaint and MLC, offence under Section 377 of IPC is not made out. It is further stated that the allegations in the complaint were that the petitioner no. 1 had solemnized marriage with respondent no. 2 on 09.05.2022 without informing her about his previous marriage which was in subsistence and had thereafter entered into sexual relationship with her on the false pretext that the two of them were legally married. It is stated that the allegations at best could make out commission of offence under Section 493 of IPC and not under Section 376 of IPC, which has been added to aggravate the offence. It is further stated that there are no allegations of inducement to obtain valuable security to attract Section 420 of IPC. It is also stated that Section 328 of IPC is not made out in light of the allegations leveled in the FIR. It is stated that Section 506 of IPC is also not made out since there are no allegations of threat.

4. As regards the role of IO in the present case, it is stated that final report was prepared under Section 173(i)(A) of Cr.P.C. by the SHO concerned and ACP on 18.10.2022 which was retained by the IO till 28.01.2023, when it was filed before the Court. It is stated that petitioner no. 1 was granted interim protection by this Court on 10.11.2022, after which on 16.11.2022, he had handed over various

documents to the IO to show the illegal acts of extortion by respondent no. 2 and her associates. It is stated that on 06.01.2023, the IO in FIR bearing no. 882/2022, Civil Lines, Moradabad, Uttar Pradesh had provided the IO in the present case with various documents pertaining to that FIR for investigation in present FIR, however, the IO of present case had neither placed the same before the Court nor were they placed for scrutiny with her superiors which is the mandate of law, and ultimately, the final report was filed on 28.01.2023. It is further stated that in the meantime, the IO had approached the petitioner no. 1 on behalf of respondent no. 2 and had insisted upon to meet respondent no. 2 and her relatives and settle the issues with threats of untoward repercussions, and accordingly, on 08.12.2022, 13.12.2022 and 30.12.2022, petitioner no. 1 had met the respondent no. 2, her relatives/associates and the IO of the present case, where he had been forced to pay money and settle the case which he refused. It is stated that again at the insistence of respondent no. 2, another meeting was held on 27.01.2023 where similar demands were raised and when petitioner no. 1 had refused to give into this extortion, then the IO had filed the final report on 28.01.2023, which had been signed on 18.10.2022, without letting her seniors get acquainted with the developments in the case i.e. about the truthful and unimpeachable material provided by the petitioner. It is stated that whereabouts of petitioner no. 1 were in the knowledge of the IO since he is on interim protection, however, the IO incorrectly mentioned the status of the petitioner no.1 in the final report on 28.01.2023 as ‘absconding’, thereby deliberately creating

false record to misguide the Court and cause prejudice to petitioner no. 1.

5. The genesis of the matter, as stated in the petition, is the fact that respondent no. 2 and her associates including one ACP 'SD' had tried to extort money from petitioners and had obtained Rs.30-40 lakhs and had further demanded Rs. 50 lakhs for which petitioner no. 1 had got FIR no. 822/2022, registered at P.S. Civil Lines, Moradabad, Uttar Pradesh under Section 388 of IPC against them, and even after that, respondent no. 2 and her associates had demanded Rs. 2 crores. It is stated that during investigation of the present case, petitioner no. 1 had filed multiple complaints dated 07.09.2022, 09.09.2022, 07.11.2022 and 13.03.2023 against ACP 'SD' with the ACB/Delhi, Lokayukt Delhi, etc. which have not been made part of the final report. It is stated that petitioner no.1 had also written letter to IO to preserve CCTV video of the Mall wherein the meeting dated 27.01.2023 had taken place between petitioner no. 1 and respondent no. 2 and her associates on the asking of the IO. It is stated that petitioner no. 1 had made repeated requests to the IO to secure CAF, CDR and location chart of the numbers of respondent no. 2 and her associates and family members who, at different dates, had tried to extort money from petitioner no. 1.

6. It is stated that aggrieved by the said conduct of IO, respondent no. 2 and her associates, an application under Section 91 of Cr.P.C. was filed before the learned ACMM by the petitioners seeking the details of CAF, CDR and location data of the aforesaid persons. It is stated that the transcript of conversation between petitioner no.1 and

respondent no. 2 and her sister dated 29.07.2022, which is part of supplementary final report mentioning meeting at petitioner no.1's office when he had disclosed about the subsistence of his marriage and respondent no. 2 and petitioner no. 1 had signed one MoU on 09.05.2023, will show that they had convened together at the office of petitioner no. 1 on 12.04.2022 and 14.04.2022 and were aware of subsistence of his marriage prior to the alleged ceremony dated 09.05.2023. It is stated that since transcript is relied upon, there is no reason to decline corroborative material like CAF, CDR and location data. It is further stated that on 01.08.2022, ACP SD had contacted petitioner no. 1 telephonically and had asked him to meet on the same day at some chamber in Karkardooma Courts Complex and during this meeting, the said ACP and his associates had not only destroyed the original MoU dated 09.05.2022, but had also forcibly made the petitioner no. 1 sign certain documents, and had deleted his chats with respondent no. 2, which would have shown that she was aware of his subsisting marriage prior to 09.05.2023. It is stated that since they have been deleted from the petitioner no. 1's phone, they can be recovered by seizing and scrutinizing the phone of respondent no. 2. It is also stated that the respondent no. 2 had regularly met the petitioner no. 1 on various occasions, till after June, 2022, when she admits first becoming aware of his marriage, and had even undertaken trips with him to various parts of India and the same shall also stand established by the said CDR, CAF and Location data. It is further stated that such data will also serve to corroborate the meetings, calls and interactions between the petitioner no. 1 and

respondent no. 2, her family members and her associates including interactions with ACP SD, in the months of May, June and July, 2022. It is stated that petitioner no. 1 has been suffering continuous demands from these persons, who have been demanding Rs. 2 crores to facilitate a settlement with the respondent no. 2. As per the case of petitioners, the CDR and Location data shall also show that the petitioner no. 1 on the asking of the respondent no. 2 had visited Hotel Leela, Karkardooma, Delhi on 27.07.2022, and if respondent no. 2 had become aware of the subsisting marriage of petitioner no. 1 only in June 2022, there would have been no occasion for her to meet him and stay at the said Hotel on the said date. It is further stated that CDR and Location would also make evident the detailed meetings dated 08.12.2022, 13.12.2022 and 30.12.2022, held on the respondent no. 2's insistence, between her and the petitioner no. 1, under IO's observation, at PS Anand Vihar. It is further stated that petitioner no. 1 was compelled to meet a few associates of respondent no. 2 at Geeta Colony on 03.02.2023, at Jhilmil Colony on 19.02.2023 and at Geeta Colony on 25.02.2023, and it is essential to secure the CDR and location data of the mobile phone numbers of these persons, so as to establish the factum of these meetings, as well as the extortion committed by the respondent no. 2 and her associates. It is stated that the petitioners have repeatedly requested the IO to seize the mobile phones of the respondent no. 2 and her relatives, which could serve to establish the factum of the above allegations, as the contents of the chats, and other communications can be seized, and forensically examined. It is stated that the entire narration of events leading to the

present FIR are all proven false by the unimpeachable technical evidence accessible to the local police. It is stated that the events succeeding the lodging of the present FIR, and that starting from 10.04.2022, till after the lodging of the FIR, show that not only were the respondent no. 2 and her family aware of the petitioner no. l's divorce being pending, but she continued to interact with him, with the intention of extorting money from him. It is stated that unfortunately, the police have deliberately chosen to not only conceal the material made available by the petitioner no. 1, but also have failed to seize and secure the material which not only are they duty bound to, but are also required to seize to ensure an unbiased and fair investigation. In this regard, it is stated that the above evidence is crucial for the disposal of the present case, and thus must be collected in earnest.

7. It is stated that petitioners do not have excess to the above maintained record by third party and this material is necessary for proper investigation and just adjudication of the present FIR. It is further stated that the documents are in custody of their respective owners and sufficient preliminary evidence has been provided in the present petition and was also provided in the application under Section 91 of Cr.P.C. filed before the learned ACMM who had only directed preservation of the said record since the discretion to make it apart of the final report finally rest with the IO and admissibility of such material evidence is the matter of trial. It is stated that no prejudice would be caused to the respondent no. 2, and instead, it would assist the Court in proper adjudication of the case. It is also

stated that respondent no. 2 without any locus had filed the revision petition under Section 397 of Cr.P.C. and the order dated 10.04.2023 passed by learned ACMM was stayed by learned ASJ without giving any opportunity to the petitioners, and even the application filed by the petitioner seeking vacation of the stay was dismissed *vide* order dated 09.05.2023. It is stated that *vide* impugned order dated 09.06.2023 passed by learned ASJ, the order dated 10.04.2023 passed by learned ACMM was set side and therefore, the present petition impugning the order dated 09.06.2023 has been filed.

SUBMISSIONS AT THE BAR

i. Submissions on Behalf of Petitioners

8. Learned Senior Counsel for the petitioners argues that the impugned order is bad in law as it fails to take into consideration the settled law on the point. It is stated that the revision petition against order dated 10.04.2023 passed by learned ACMM was not maintainable as an order on application under Section 91 of Cr.P.C. is interlocutory in nature and revision petition against the same under Section 397 of Cr.P.C.is barred by law. It is also stated that the learned ASJ while dealing with such contention had incorrectly termed the order dated 10.04.2023 as an intermediate order. It is stated that the directions by learned ACMM *vide* order dated 10.04.2023 were only for preservation of record. It is further argued that the learned ASJ has erroneously observed that the judgment passed by Hon'ble Apex Court in ***Seturaman v. Rajamanickam***

(2009) 5 SCC153 is not applicable to the present case because it is based on case under Section 138 of the Negotiable Instruments Act, 1881 and that the documents sought were different from the defence raised before the learned Trial Court in that case. In this regard, it is argued on behalf of petitioners that the observations made by the Hon'ble Apex Court in the said judgment were general in nature, describing the law of the land, and were nowhere related to Section 138 of NI Act or on the defence of the accused. It is further stated that the Hon'ble Apex Court and various High Courts have passed orders laying down that the orders on applications under Section 91 of Cr.P.C. are interlocutory in nature. It is argued that the impugned order fails to show which valuable right of the parties stood decided while allowing an application under Section 91 of Cr.P.C., thereby terming the order as an 'intermediate order' instead of 'interlocutory order'.

9. Learned Senior Counsel for the petitioners further argues that learned ASJ erroneously observed that the preservation of record and it becoming part of supplementary chargesheet would affect the course of trial in either way, and employed this reasoning to disallow the petitioners to have relevant records preserved. It is stated that the accused is entitled to defend himself and in case the records are not preserved today, the same would result in miscarriage of justice. It is also argued that only the CAF, CDR and location relating records of the complainant were summoned by the learned Magistrate the custodian of which is independent agency and not the complainant herself. Thus, the complainant could also not have any prejudice

caused apart from her deliberate tactic to ensure that any unimpeachable evidence that exposes the falsity of her allegations must not be brought on record. It is stated that fair investigation is right of the accused and that the learned ASJ while passing the impugned order has not considered the same.

10. It is contended by learned Senior Counsel for the petitioners that the order passed by the learned ASJ is contrary to law of the land and that as per Section 91 of Cr.P.C., the same can be applied for at any stage, i.e., either an enquiry prior to prosecution, during investigation after lodging an FIR, and even during trial. It is stated that the provision does not bar the accused from approaching the Court with an application under Section 91 of Cr.P.C. It is also argued that even as per the case laws relied upon by the learned ASJ in the impugned order on the issue of right of accused to file an application under Section 91 before the stage of charge, the said case laws do not expressly bar the right of accused to invoke Section 91 before the stage of charge, contrary to what has been held by learned ASJ. It is stated that duty is cast upon the Courts to ascertain the necessity and desirability of the document sought for, and in the present case, while the necessity and desirability is evident, the disadvantage faced by the petitioners is the time sensitive nature of the documents, and their imminent destruction and loss, if not preserved

11. Learned Senior Counsel for the petitioners states that the learned ASJ did not consider that respondent no. 2 had no locus to prefer a revision petition against order dated 10.04.2023 passed by

learned ACMM, and none of the documents sought to be preserved by the said order were either in the custody of respondent no. 2, or were to be brought forth by her. It is submitted that the learned ASJ has erroneously passed the impugned order, thereby setting aside certain directions given by the learned ACMM, which has caused grave injury to the petitioners. It is, therefore, prayed that order dated 09.06.2023 passed by learned ASJ be set aside and the order dated 10.04.2023 passed by learned ACMM be restored.

ii. Submissions on Behalf of Respondent no. 2

12. Opposing the present petition, learned counsel for complainant/respondent no. 2 argues that there is no infirmity with the order passed by the learned ASJ whereby the learned ASJ has rightly set aside the illegal order dated 10.04.2023 passed by learned ACMM. It is stated that even during the pendency of the revision petition before the learned ASJ and when the operation of order dated 10.04.2023 had been stayed by way of an interim order passed by learned ASJ, the petitioner no. 1 had again filed a similar kind of second application under Section 91 of Cr.P.C. before the learned ACMM for seeking similar and identical reliefs and ultimately on 19.07.2023, the said application had been withdrawn by the learned counsel for petitioner no. 1 with liberty to file a fresh application at appropriate stage as per law. It is argued that in view of such developments, the present petition has become infructuous.

13. It is argued by learned counsel for respondent no. 2that it is a settled law that before the commencement of trial, the defence of

accused cannot be considered and the appropriate stage to file an application under Section 91 of Cr.P.C. would arise only after the accused is summoned and the charges are framed against him, and not anytime before it. It is argued that in the present case, the investigation has not been fully completed yet and even the cognizance of chargesheet has yet not been taken by the learned Trial Court and, therefore, the application filed under Section 91 of Cr.P.C. by the petitioners was an abuse of process of law and the same ought not to have been entertained by the learned ACMM. It has argued that the law regarding accused not entitled to file an application under Section 91 of Cr.P.C. till the commencement of trial is well-settled by the Three-judge Bench of Hon'ble Apex Court in ***State of Orissa v. Debendra Nath Padhi*** *(2005) 1SCC 568* and other subsequent judgments. It is further submitted that the contentions raised herein with regard to maintainability of the revision petition before the learned ASJ have already been dealt with in the impugned order and there is no reason to interfere with the decision of the learned ASJ in that aspect also.

14. Learned counsel for respondent no. 2 contends that even though the application under Section 91 of Cr.P.C. was not maintainable at this stage when it was filed by the accused, the learned ASJ also proceeded to consider and assess the order dated 10.04.2023 on the basis of standard of 'necessity or desirability' and ultimately held that even on the basis of this test, the order was liable to be set aside. It is also stated that the petitioners have not approached this Court with clean hands and there has been

intentional and deliberate concealment and suppression of facts before this Court. Therefore, it is prayed that present petition be dismissed.

15. This Court has heard arguments addressed by learned Senior Counsel for the petitioners and learned counsel for respondent no. 2/complainant. The material placed on record including the case laws relied upon by both the parties has been perused.

ANALYSIS AND FINDINGS

16. Since the entire controversy in the present case relates to the order passed on an application filed by petitioners under Section 91 of Cr.P.C., it shall be relevant to refer to the same, which reads as under:

> "**91. Summons to produce document or other thing**.
>
> (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.
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> (2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.
>
> (3) Nothing in this section shall be deemed-
>
> (a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or

> (b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority…"

17. In the present case, learned ACMM *vide* order dated 10.04.2023 had allowed the application filed by petitioners under Section 91 of Cr.P.C. thereby directing preservation of certain records. Assailing the said order, the respondent no. 2 had approached the Court of learned ASJ by way of a revision petition and *vide* impugned order dated 09.06.2023, learned ASJ has set aside the order passed by learned ACMM.

18. The arguments before this Court were addressed both on the issue of maintainability of revision petition before the learned ASJ as well as on the merits of the case including the correctness of order dated 10.04.2023 passed by learned ACMM.

19. Thus, the first issue raised before this Court on behalf of petitioners is that the revision petition filed before the learned ASJ against the order passed under Section 91 of Cr.P.C. was not maintainable since the such an order was 'interlocutory' in nature, against which a revision petition is barred by law. On the issue of maintainability of revision petition, the learned ASJ *vide* impugned order dated 09.06.2023 has held as under:

> "...8. At the outset, Ld. Counsel for respondents has challenged the present revision petition on the ground of maintainability arguing that order of Ld. ACMM Shahdara on an application under Section 91 Cr.P.C. is interlocutory in nature and therefore, no revision petition is maintainable against such an order. Per contra, it is asserted by Ld. Counsel for revisionist that the impugned order is not interlocutory but intermediate in nature as if effects the important rights of the parties.

> 8.1 In this regard, this Court has gone through the case laws relied upon by both the parties viz *Sethuraman Vs. Rajamanicam (2009). 5 SCC 153* and *Honnaiah T H Vs. State of Karnataka, (2022) 3 Crimes 284 SC*. It is observed that in *Sethuraman (Supra)*, the question of calling the documents on the strength of Section 91 Cr.P.C. was dealt with in a case under Section 138 NI Act and secondly, the order was passed in the peculiar circumstances where the nature of documents sought was entirely contrary to his defence raised before the Trial Court. As such, the said judgment can not be ipso facto applied to the facts of the present case. On the other hand, the judgment in *Honnaiah (supra)* deals with the law pertaining to interlocutory and intermediate orders in general. It was categorically held by Hon'ble Supreme Court in the said judgment after careful study of the other precedents on the subject that any order which substantially effects the rights of the accused, or decides certain rights of the parties can not be said to be an interlocutory order because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 Cr.P.C.'
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> 8.2 In the present case, Ld. Trial Court has not only decided an application in exercise of its discretionary power in favor of accused but' also ordered certain record to be preserved, which, if preserved and made part of the supplementary chargesheet, shall remain on record for throughout the life of the case. Such record may also affect the course of trial in either way. In such circumstances, the Sessions Court is well within its power to treat such an order to be intermediate in nature and assess its correctness, legality and propriety. As such, the present revision petition is maintainable and the argument against its maintainability can not be accepted..."

20. In this regard, learned Senior Counsel for the petitioners argued that the law on this issue is well-settled by the Hon'ble Apex Court in case of ***Seturaman*** *(supra)*in which it was held that an order passed under Section 91 of Cr.P.C. is interlocutory in nature. On the other hand, learned counsel for respondent no. 2 argued that as rightly held by learned ASJ, the order under Section 91 was not interlocutory but intermediate in nature and the decision of Hon'ble

Apex Court in ***Seturaman*** *(supra)* is not applicable to the facts of present case as also held by learned ASJ.

21. To appreciate these rival contentions, it shall be useful to refer to the decision in case of ***Seturaman*** *(supra)* whereby the Hon'ble Apex Court has held as under:

> "..4. Secondly, **what was not realized was that the order passed by the Trial Court refusing to call the documents** and rejecting the application under Section 311 Cr.P.C., **were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397(2) Cr.P.C.** The Trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent/accused and the only defence that was raised, was that his signed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. **This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e., one on the application under Section 91 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for recalling the witness, were the orders of interlocutory nature, in which case, under Section 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction.** The impugned judgment is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed..."
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> (Emphasis supplied)

22. Thus, it was held by the Hon'ble Apex Court that the orders dismissing applications under Section 311 and Section 91 of Cr.P.C. were interlocutory in nature as the same did not decide anything finally.

23. Relying upon the decision of ***Seturaman*** *(supra)*, the Hon'ble High Court of Madhya Pradesh in ***Dadhibal Prasad Jaiswal & Anr.***

v. Sunita Jaiwal *Misc. Crl. Case No. 5983/2014, order dated 24.03.2022,* observed as under:

> "..7. The **order passed by the Supreme Court in (2009) 5 SCC 153 (Sethuraman Vs. Rajamanickam) is precise, unequivocal and unambiguous. It has clearly arrived at the finding that orders passed on the application under section 91 Cr.P.C. and section 311 Cr.P.C. are interlocutory in nature barring the jurisdiction of a criminal revision.** Reasons have not been assigned in the said judgment as to why it considers the said orders passed in such applications, as interlocutory. However, the finding is unambiguous, unequivocal. Under the circumstances, judicial discipline demands that this Court feels bound by the said finding..."
>
> (Emphasis supplied)

24. Similar view has also been taken by Hon'ble Rajasthan High Court in ***Hemraj Nama v. M/s. Goyal General Store*** *2013 SCC OnLine Raj 1591*, and by Hon'ble High Court of Allahabad in ***Arun Kumar Kaushik v. State of U.P.*** *2013 SCC OnLine All 1932*.

25. At this juncture, without going into the merits of the case, as far as order dated 10.04.2023 passed by learned ACMM is concerned, the following directions were passed therein:

a) Mobile phones of the accused/petitioners already seized and sent to the FSL for examination be also verified with regard to call details i.e. the calls so made from the said mobile phones during the relevant period;

b) Whether the mobile phone of the respondent no. 2/complainant is to be sent to FSL is the prerogative of IO;

c) Preservation of Call Detail Records since 11.04.2022 or relevant period, of the alleged persons;

d) Joint CP concerned shall personally look into the investigation qua the role of ACP 'SD' in the present matter with regard to allegations leveled against him by the accused i.e. petitioners herein;

e) With regard to CCTV footage of P.S. Anand Vihar, Delhi, the DCP concerned shall file a report as to why CCTV footage for the month of December, 2022 was not available and shall ensure that the same is preserved if available.

26. It was argued before this Court on behalf of respondent no. 2 that the decision in case of ***Seturaman*** *(supra)* cannot be applied in the present case as no general rule of law was laid in by the Hon'ble Apex Court that all orders passed under Section 91 would be interlocutory in nature and in that case, the Trial Court had dismissed the application under Section 91 in relation to a case under Section 138 of NI Act thereby recording that the documents were not necessary and no rights as such were decided by the said order. However in the present case, as argued by learned counsel for respondent no. 2, the order passed by learned ACMM was to be treated as intermediary order since directions qua preservation of records were given by the Court which would ultimately affect the trial of the case, as also held by learned ASJ.

27. Thus, to examine as to whether the order passed under Section 91 of Cr.P.C. by the learned ACMM in the present case can be considered as intermediate and not interlocutory, it shall be necessary to consider the precedents of Hon'ble Apex Court.

28. In ***Honnaiah T.H. v. State of Karnataka*** *2022 SCC OnLine SC 1001,* the Hon'ble Apex Court had considered the judicial precedents on the issue at hand and made the following observations with regard to characteristics of interlocutory order:

> 13. There would be a serious miscarriage of justice in the course of the criminal trial if the statement were not to be marked as an exhibit since that forms the basis of the registration of the FIR. The order of the trial judge cannot in these circumstances be treated as merely procedural or of an interlocutory in nature since it has the potential to affect the substantive course of the prosecution. The revisional jurisdiction under Section 397 CrPC can be exercised where the interest of public justice requires interference for correction of manifest illegality or the prevention of gross miscarriage of justice. **A court can exercise its revisional jurisdiction against a final order of acquittal or conviction, or an intermediate order not being interlocutory in nature.** In the decision in *Amar Nath v. State of Haryana*, this Court explained the meaning of the term "interlocutory order" in Section 397(2) CrPC. **This Court held that the expression "interlocutory order" denotes orders of a purely interim or temporary nature which do not decide or touch upon the important rights or liabilities of parties. Hence, any order which substantially affects the right of the parties cannot be said to be an "interlocutory order".** Speaking for a two-Judge Bench, Justice Murtaza Fazal Ali observed:
>
> > "6. […] It seems to us that the term **"interlocutory order"** in Section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It **merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties.Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order** so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code. **Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders** against which no

> revision would lie under Section 397(2) of the 1973 Code. **But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order** so as to be outside the purview of the revisional jurisdiction of the High Court."

14. Explaining the historical reason for the enactment of Section 397(2) CrPC, this Court observed in *Amar Nath (supra)* that the wide power of revision of the High Court is restricted as a matter of prudence and not as a matter of law, to an order that "suffered from any error of law or any legal infirmity causing injustice or prejudice to the accused or was manifestly foolish or perverse." In *KK Patel v. State of Gujarat,* where a criminal revision was filed against an order taking cognizance and issuing process, this Court followed the view as expressed in *Amar Nath (supra),* and observed:

> "11. [….] It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, **the sole test is not whether such order was passed during the interim stage** (vide Amar Nath v. State of Haryana, Madhu Limaye v. State of Maharashtra, VC Shukla v. State, and Rajendra Kumar Sitaram Pande v. Uttam). **The feasible test is whether upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code.** In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable."

15. In the decision in *VC Shukla (supra*), this Court noted that under the CrPC, the question whether an order such as an order summoning an accused or an order framing a charge is an "interlocutory order" must be analysed in the light of the peculiar facts of a particular case. In the present case, the objection taken by the defense counsel (which was upheld by the trial judge) that the statement of the informant is a statement under Section 161 CrPC travels to the root of the case of the prosecution and its acceptance would substantially prejudice the case of the prosecution. According to the charge sheet, the statement of the appellant/informant formed the basis of the FIR and set the criminal law in motion. Rejection of the prayer of the Public

> Prosecutor to mark the statement as an exhibit would possibly imperil the validity of the FIR. In this background, the order of the trial court declining to mark the statement of the informant as an exhibit is an intermediate order affecting important rights of the parties and cannot be said to be purely of an interlocutory nature. In the present case, if the statement of the appellant/informant is not permitted to be marked as an exhibit, it would amount to a gross miscarriage of justice..."

29. In this Court's opinion, the directions as passed by the learned ACMM *vide* order dated 10.04.2023 do not decide any important rights or liabilities of the parties involved. The first direction in the said order is in respect of the prayer of the accused persons that the call details of their mobile phones may be verified by the FSL and it is in that regard that the learned ACMM had directed the IO to ensure that the mobile phone of the accused persons which had already been sent to the FSL be also verified with regard to call made this mobile phone during the relevant period of time. In this Court's opinion, when the mobile phone had already been sent to FSL for the purpose of examination, the direction to further ensure verification of the same qua one more aspect does not decide any substantial rights of the parties involved in the present case. Secondly, the another direction relates to taking appropriate steps with regard to preservation of CDRs of the alleged persons. However, there is no direction to the IO to place the same on record alongwith the chargesheet. Thus, the direction to preserve CDRs also cannot be said to affect the substantial or important rights and liabilities of any of the parties directly. Furthermore, with regard to the mobile phone of the respondent no. 2 being sent to FSL or not it, was directed by the

learned ACMM that it was the prerogative of the IO whether to do so or not and, thus, no such direction either to send or not to send her mobile phone to FSL was given by the learned ACMM. The further directions issued by the learned ACMM are to the Joint Commissioner of Police to personally look into the investigation of present case with regard to role of one ACP who, as per the accused/petitioners, was involved in extorting money from them on behalf of respondent no. 2, and the other direction has been given to the DCP concerned to see as to why the CCTV footage of PS Anand Vihar was not available for a period of one month. In this Court's opinion, none of these directions also can be said to touch upon the important rights of the parties. These directions also do not affect any particular aspect of the trial, since even the cognizance of chargesheet had yet not been taken and investigation on certain aspects was pending, and the directions only relate to preservation of certain records during the course of investigation, and the said order does not terminate any proceedings.

30. Even in the impugned order dated 09.06.2023, the learned ASJ has categorically noted that the Trial Court has ordered certain records to be preserved and if they get preserved, and if at all they are made part of the supplementary chargesheet, will remain on record for throughout the life of the case and may also affect the course of trial either way. It is only because of such reason that the order passed by learned ACMM has been treated as intermediate in nature by the learned ASJ. In the considered opinion of this Court, it cannot agree with the reasoning of the learned ASJ and, therefore, also

relying upon the decision of the Hon'ble Apex Court in case of ***Sethuraman*** *(supra)*, as well as independently examining the order passed by learned ACMM on the touchstone of principles laid down by the Hon'ble Apex Court *qua* interlocutory orders, this Court is of the opinion that the order passed on application filed under Section 91 Cr.P.C. even in the present case would fall in the category of interlocutory order.

31. Therefore, this Court is of the view that the *revision petition filed before the learned ASJ was not maintainable, being a petition against an interlocutory order*. Thus, the order dated 09.06.2023 passed by learned ASJ is liable to set aside on this ground.

32. However, arguments on merits of the case had also been addressed before this Court since the petitioners also seek restoration of order dated 10.04.2023 passed by learned ACMM, and the attention of this Court was drawn towards the directions issued *vide* order dated 10.04.2023 passed by learned ACMM.

33. While the learned Senior Counsel for the petitioners contended that the order passed by learned ACMM was justified in law and ought not to have been set aside by the learned ASJ and thus, should be restored by this Court, the learned counsel for respondent no. 2 argued to the contrary that the order passed by learned ACMM was illegal and perverse on the face of it.

34. To appreciate their arguments, this Court has carefully perused the order dated 10.04.2023 passed by the learned ACMM, the contents of which have already been discussed in the preceding paragraphs.

35. The attention of this Court was drawn towards the fact that when the order dated 10.04.2023 was passed by learned ACMM, no notice had been issued either to the complainant/respondent no. 2 herein or to any other affected party such as ACP 'SD' at any point of time before the passing of the said order. In this regard, this Court notes that the rights of victims, especially those under Section 376 of IPC, are well-recognized. As held by the Hon'ble Apex Court in case of ***Jagjeet Singh v. Ashish Mishra*** *2022 SCC OnLine SC 453*, the victim in a criminal case has the participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision. The relevant observations of the Hon'ble Apex Court in this regard read as under:

> "...22. It cannot be gainsaid that the rights of a victim under the amended CrPC are substantive, enforceable, and are another facet of human rights. The victim's right, therefore, cannot be termed or construed restrictively like a *brutum fulmen*. We reiterate that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the CrPC. The presence of "State" in the proceedings, therefore, does not tantamount to according a hearing to a "victim" of the crime.
>
> 23. **A "victim" within the meaning of CrPC cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/She has a legally vested right to be heard at every step post the occurrence of an offence. Such a "victim" has unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision**. We may hasten to clarify that "victim" and "complainant/informant" are two distinct connotations in criminal jurisprudence. It is not always necessary that the complainant/informant is also a "victim", for even a stranger to the act of crime can be an "informant", and similarly, a "victim" need not be the complainant or informant of a felony..."
>
> (Emphasis supplied)

36. In these circumstances, this Court is of the opinion that the learned ACMM committed an error by not issuing notice and providing an opportunity of hearing to the complainant before passing directions qua the investigation in the present case which was being conducted in an FIR lodged at the behest of complainant i.e. respondent no. 2.

37. Secondly, it is not disputed by either of the parties that when the order dated 10.04.2023 was passed by the learned ACMM, the cognizance of the chargesheet and one supplementary chargesheet filed before the Court had not yet been taken as the investigation was still pending in the present case. The accused persons in the present case had also not been summoned to appear before the Court concerned. It is no more *res integra* that at the time of taking cognizance or framing of charge, the defence of accused cannot be considered and the accused has no right to produce any material. Furthermore, under Section 91 of Cr.P.C., the accused cannot seek production of any material even at the stage of framing of charge. In this regard, reliance can be placed upon the decision of Hon'ble Apex Court in case of ***Debendra Nath Padhi*** *(supra)* in which it was held as under:

> "25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. **If any document is necessary or desirable for the**

defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. **Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence.** When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. **Section 91 does not confer any right on the accused to produce document in his possession to prove his defence**. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

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27. In so far as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt inherent limitations as to the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by High Court and this Court..."

38. In ***Nitya Dharmananada v. Gopal Sheelum Reddy*** *(2018) 2 SCC 1993*, it has been observed as under by the Hon'ble Apex Court:

"5. It is settled law that **at the stage of framing of charge, the accused cannot ordinarily invoke Section 91**. However, the

> court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power, the court is to be satisfied that the material available with the investigator, not made part of the chargesheet, has crucial bearing on the issue of framing of charge.
>
> 8. Thus, it is clear that while ordinarily the **Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet.** It does not mean that the defence has a right to invoke Section 91 Cr.P.C. de hors the satisfaction of the court, at the stage of charge..."
>
> (Emphasis supplied)

39. Even considering the argument raised on behalf of petitioners that the aforesaid judgments create an exception that if the prosecution has withheld some material of sterling quality, the accused can seek production of the said material, this Court notes that as observed by the Hon'ble Apex Court, if the Court is satisfied that there is some material of 'sterling quality' which has been withheld by the investigator/prosecutor, then the Court is not debarred from summoning or relying upon the same, even if such document is not part of the chargesheet, *at the stage of framing of charge*. However, it is to be noted that this exception categorically deals with the situation where the investigation has been completed by the prosecution and the case is at the stage of framing of charge, and at such stage, the Court considers that some material of sterling quality has been withheld, in respect of which the Court can order production of any such document on the asking of accused.

40. However, as observed earlier, the investigation in the present case was still pending and was not complete by the investigating agency and even the cognizance of the offence had not been taken and accused persons had not been summoned by the Court. In such circumstances, this Court is of the considered opinion that the application filed by the accused/petitioners under Section 91 of Cr.P.C. ought not to have been entertained by the learned ACMM, and even the exception carved out in case of ***Nitya Dharmananada*** *(supra)*, can also be of no help to the petitioners herein.

41. This Court is also constrained to observe that one of the directions given by the learned ACMM was that the Joint Commissioner of Police shall personally look into the investigation with regard to the role of one ACP in the present matter since as per the version of accused, the said ACP had been involved in threatening and extorting money from the petitioners in relation to present case. Passing such a direction in an application filed by the accused under Section 91 of Cr.P.C. even before the cognizance had been taken, on the face of it, seems devoid of any legal foundation. Furthermore, in regards to allegations of commission of acts of extortion against the petitioners herein by the associates of respondent no. 2, the petitioners had already got an FIR registered in Moradabad, Uttar Pradesh and, thus, there was no occasion even otherwise for the learned ACMM to pass such a direction to the Joint Commissioner of Police.

42. To summarize, this Court is of the opinion that the learned ACMM committed an error of law by allowing the application filed

by the accused/petitioners under Section 91 of Cr.P.C. at a stage where the investigation in the present case was not yet complete and the cognizance had not been taken by the Court.

43. Thus, by exercising powers under Section 482 of Cr.P.C. and to prevent abuse of process of law and miscarriage of justice, which is clear from the aforesaid discussion, *this Court finds no reason to restore the order dated 10.04.2023 passed by learned ACMM, and the same is accordingly set aside* .

44. However, it is clarified that the petitioners shall be at liberty to approach the concerned Court/learned ACMM by way of an application under Section 91 of Cr.P.C. at an appropriate stage, as per law laid down by Hon'ble Apex Court in this regard in case of ***Debendra Nath Padhi*** *(supra)* and ***Nitya Dharmananada*** *(supra).* If any such application is filed by the petitioners, the same shall be decided by the concerned Court/learned ACMM as per law, after issuing notice to the complainant, and in light of aforesaid observations of this Court.

45. Accordingly, the present petition alongwith pending application, if any, stands disposed of in above terms.

46. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

SEPTEMBER 26, 2023/dk